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In The

Supreme Court of the United States

PROGRESS ENERGY, INC.,

Petitioner,

v.

BARBARA TAYLOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE ASSOCIATION OF CORPORATE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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CORPORATE DISCLOSURE STATEMENT

The Association of Corporate Counsel is a non-profit corporation that has no parent corporation and no shareholders.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Association of Corporate Counsel ("ACC") is the in-house bar association, serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. Since its founding in 1982, ACC has grown to include more than 22,000 individual in-house counsel members who work in more than 9,000 business entities worldwide. In the United States, ACC members are at work in every one of the Fortune 100 companies. ACC has an Employment and Labor Law Committee with over 5,000 attorney members.

One of the primary missions of the ACC is to act as the voice of the in-house bar on matters of concern to corporate legal departments, and matters implicating the ability of its members to fulfill their functions as legal counselors to their corporate clients. As ACC's mission statement proclaims, "The Association of Corporate Counsel promotes the common professional and business interests of attorneys who are employed to practice law by corporations, associations, and other private-sector organizations by developing and disseminating information . . . and engaging in advocacy on behalf of the in-house bar."

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[1] This brief is filed with the written consent of all parties. Counsel for the Association of Corporate Counsel states that they authored this brief. No person or entity other than the association, its members, and its counsel, made any monetary contribution to fund the preparation or submission of this brief.

Many ACC members are responsible for providing advice on employment law issues to businesses which must comply with the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* ("FMLA"). In a 2006 survey, members of the ACC identified FMLA compliance as the single employment law issue of greatest concern to them. Because of its members' interest in the FMLA, the ACC has expressed its views to the United States Department of Labor ("DOL") on the difficulty in making determinations as to full compliance with the obligations imposed by the FMLA.

As in-house counsel on workplace law issues for the Nation's corporations, the ACC shares, as *amicus curiae,* its unique perspective regarding interpretation of the FMLA, the impact of the uncertainty brought about by the Fourth Circuit's decision in *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007), *reinstating* 415 F.3d 364 (4th Cir. 2005), and the circuit conflict thus created with respect to the validity of waivers and releases of claims arising under the FMLA.

SUMMARY OF ARGUMENT

The ACC is concerned about the damage wrought by uncertainty over the ability of employers and employees to resolve actual and potential FMLA disputes. In many ways, the Nation is just beginning to grapple with the enormously important societal,

business and legal implications surrounding an employer's obligation to provide job-protected leaves for an employee's own illness or to fulfill family caregiver responsibilities. The precise contours of this obligation will be the subject of litigation for many years. As the DOL and courts work through those issues, there must be an escape route for employees and employers having no desire to be trapped in the disruption, expense and uncertainty of employment litigation.

The ability to settle FMLA claims provides that escape route, but only so long as the process is clear, and the resulting waiver is enforceable. The current split of authority resulting from the Fourth Circuit's decision below eliminates this certainty, depriving all FMLA stakeholders of the escape route, essentially encouraging litigation despite the willingness and desire of an employer and employee to resolve a disputed claim without resort to the courts. Furthermore, the Fourth Circuit's ruling casts doubt over the ability, and willingness, of employers to enter into individual and group separation agreements, where the ability to secure a general release (and thereby avoid future litigation) is the *sine qua non* for generous separation payments and benefits. Not only will this uncertainty discourage employers from pre-litigation resolution of claims arising under the FMLA, but it will interfere with pre-litigation settlement of claims which are frequently intertwined with FMLA claims, e.g., claims arising under the Americans with Disabilities Act ("ADA"), Title VII of the

Civil Rights Act of 1964 ("Title VII"), the Pregnancy Discrimination Act ("PDA"), the Equal Pay Act ("EPA"), the Employee Retirement Income Security Act of 1973 ("ERISA"), and a host of state laws.

The conflict created by the Fourth Circuit's central holding – that without prior DOL or court approval, waivers or releases of rights under the FMLA are unenforceable – places in doubt additional matters which are critical to an employer's willingness to resolve privately FMLA and related claims:

- Can FMLA claims be waived under any circumstances?
- Can some, but not other, FMLA claims or rights be waived?
- Will a court have Article III jurisdiction over an action brought solely to approve an FMLA waiver?
- Will the DOL have and dedicate the resources to evaluate and approve FMLA waivers and, if not, how can parties secure approval of FMLA waivers?

The confusion and uncertainty stemming from these questions likely will grow, exacerbating the conundrum faced by in-house counsel and other FMLA stakeholders. Furthermore, the decision below causes additional difficulties by undermining employers' ability to rely upon an agency's interpretation of its own regulations. The ACC respectfully asks this Court to grant certiorari to resolve the uncertainty surrounding

the ability of employers and employees to enter into agreements containing enforceable FMLA waivers, thereby allowing all FMLA stakeholders to benefit from knowledge of certain processes to follow in the private, pre-litigation resolution of FMLA and related claims.

ARGUMENT:

REASONS FOR GRANTING THE PETITION

A. The Circuit Conflict Harms Employers and Employees by Limiting Their Ability to Avoid Litigation Over Exceedingly Complex FMLA Compliance Issues.

The conflict created by the Fourth Circuit's decision below upsets an important workplace dynamic. Today, current and former employees willingly and often enthusiastically agree to resolve definitively all potential claims against their employers in exchange for agreed upon consideration. In these arrangements, employers purchase one precious commodity – certainty. The finality provided by such agreements benefits all concerned. The circuit conflict resulting from the decision below eviscerates certainty. Given the high usage of FMLA leave and complexity of FMLA and leave-related claims, this new uncertainty eliminates the opportunity to obtain this bargained-for exchange, and will drive unwanted litigation that serves no one's interests.

1. Employers and Employees Alike Benefit From Certainty Concerning Their Ability to Resolve FMLA Claims Without Litigation.

While ACC believes the Fifth Circuit's holding in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003) and the DOL's interpretation of its own regulation concerning the validity of FMLA waivers are correct, the current uncertainty as to the ability of employers and employees to resolve substantive disputes about FMLA rights and obligations without resort to litigation is enormously disruptive.

Settlement agreements, and separation agreements containing releases of legal claims, have become a staple in workplace relations. Uncertainty as to their validity disadvantages both employees and employers. Releases of statutory workplace rights are used in many contexts, including individual and group severance agreements, as well as pre-litigation settlement of workplace claims. As a result of the Fourth Circuit's ruling below, employers are increasingly reluctant to enter into agreements containing releases of FMLA claims given the uncertainty concerning their enforceability. In response to a survey by ACC of its members with respect to the impact of the decision below, the following situations were disclosed:

- A financial services company employing approximately 10,000 employees and which normally executes more than 600 agreements a year containing FMLA

waivers has been unable to complete some settlements because of the uncertainty over the validity of FMLA waivers.

- Another financial services company employing approximately 31,000 employees has become hesitant to enter into any agreements resolving FMLA claims even where employees also would like to resolve the disputes.

- A hospitality company employing approximately 90,000 employees has become more conservative on settlements and is allowing cases to go to litigation before obtaining a settlement approved by a court.

- A manufacturing company employing approximately 18,000 employees has removed all references to FMLA waivers in its releases and accepted the reality that they may still be sued for such claims.

- A manufacturing company employing approximately 3,000 employees has become more reluctant to enter into settlement agreements because of the uncertainty in the state of the law governing FMLA waivers.

The difficulties are compounded by the fact that the FMLA overlaps in some respects with other federal and state laws. The ADA, in particular, is implicated when an employee takes FMLA leave due

to the employee's own serious health condition. FMLA "family" leave overlaps with an even broader range of "family responsibilities discrimination" laws. Family responsibilities discrimination ("FRD") is reportedly one of the fastest growing theories of employment claims.[2] Caregivers can bring FRD claims under Title VII as gender or race discrimination, under the Pregnancy Discrimination Act as pregnancy discrimination, or under the Americans with Disabilities Act as disability or "association" discrimination. Claims also could be brought under the Equal Pay Act or ERISA. In addition, various state statutes (leave statutes, discrimination statutes, and workers' compensation laws) provide other causes of action often intertwined with FMLA claims.

The Fourth Circuit's ruling leaves employers around the country with significant uncertainty around the use of termination programs involving releases and severance. The Bureau of Labor Statistics reports that since 2005, U.S. employers have engaged in over

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[2] Studies show that there has been an increase of over 400% in claims asserted by family caregivers in the last decade, while the increase in all other discrimination claims during the same period was 23%. *See* Joan C. Williams and Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 The Labor Lawyer 293, 295 (2007). Recently the Equal Employment Opportunity Commission issued *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007). *See* http://www.eeoc.gov/policy/docs/caregiving.html. The EEOC observed that the FMLA is only one of several statutes supporting legal claims that may be asserted on behalf of family caregivers.